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In the

Supreme Court of the United States

OCTOBER TERM, 1971

GERALD A. SCHROEDER and
CLARA JOHNSON SCHROEDER,

Petitioners,

vs.

J. C. BUSENHART, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To: The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States.

Respondents, who are past and present members of the Trustees of Schools, the Board of Education and the school administration in Mount Prospect, Illinois, submit this brief in opposition to the petition for certiorari.

QUESTIONS PRESENTED

1. Were petitioners denied constitutional rights by the assessment against them of attorneys' fees incurred by respondents as a result of petitioners' appeal of the dismissal of their original baseless and vexatious suit, or by any of

the procedural rules applied by the Illinois Courts to Section 41 of the Illinois Civil Practice Act?

2. Were petitioners denied constitutional rights by the denial of a further motion for continuance made on the day trial was to begin after repeated continuances had been granted earlier?

3. Was some "summary judgment procedure" employed which resulted in a denial of constitutional rights?

STATEMENT OF THE CASE

This case is one of almost innumerable attempts petitioners have made since 1961 to relitigate various aspects of the school district's taking under the power of eminent domain of a certain parcel of land in Mount Prospect, Illinois, for use as a school site. The history of this litigation is reported in *Trustees of Schools* v. *Schroeder*, 23 Ill.2d 74 (1961); *Trustees of Schools* v. *Schroeder*, 25 Ill.2d 289 (1962); *People ex rel. White* v. *Busenhart*, 29 Ill.2d 156 (1963) (deciding consolidated appeals in two cases); *Schroeder* v. *Illinois*, 354 F.2d 561 (7th Cir. 1965), *cert. denied*, 384 U.S. 972 (1966); and in the opinions of the Illinois Appellate Court in this case, *Schroeder* v. *Busenhart*, 80 Ill. App. 2d 431 (1st Dist. 1967), *cert. denied*, 390 U.S. 947 (1968); and *Schroeder* v. *Busenhart*, 272 N.E. 2d 750 (Ill. 1st Dist. 1971). The following is a summary of that history.

The Condemnation Trial and the First Appeal.

The condemnation action giving rise to these proceedings was commenced in the Circuit Court of Cook County, Illinois on November 6, 1959 against petitioners, Gerald A. Schroeder and Clara Johnson Schroeder, who then owned the land in question. After the Schroeders' amended tra-

verse attacking the trial court's jurisdiction was denied, the case was tried, and a jury awarded them $267,083.33. The circuit court granted the school trustees' motion for new trial, from which order the Schroeders appealed to the Illinois Supreme Court. That court reversed in *Trustees of Schools* v. *Schroeder*, 23 Ill.2d 74 (1961) and directed entry of the judgment upon the verdict.

Proceedings on Remand.

On remand, the circuit court entered judgment on the verdict, and the school trustees deposited the amount of the judgment, which with interest and costs totalled $280,956.10, with the county treasurer pursuant to Illinois statute (Ill. Rev. Stat., 1959, Ch. 47, §14). The circuit court thereupon entered an order finding fee-simple title in the school trustees and putting them in possession pursuant to provision therefor in the judgment order and as provided by Illinois law.

The Second Appeal.

The Schroeders again appealed, challenging the validity of the taking. They urged that their land could not be taken because an Illinois statute forbade the school district from taking land within forty rods of the owner's dwelling. The Illinois Supreme Court held that the statute did not have that effect as to the land in question, and affirmed in May, 1962. *Trustees of Schools* v. *Schroeder*, 25 Ill.2d 289 (1962).

Further Proceedings in the Trial Court.

While a petition for rehearing was pending in the Illinois Supreme Court, the Schroeders, after being evicted by the sheriff went back into possession and in their answer to a

petition for a rule to show cause why they should not be held in contempt of court, filed various motions in the trial court seeking to assert new grounds for challenging the validity of the taking. After the denial of rehearing by the Illinois Supreme Court, the trial court overruled these various petitions and motions. The trial court also granted the school authorities a supplemental order for possession directing the re-eviction of the Schroeders, who had unlawfully reoccupied the property, as aforesaid, while the school was being constructed.

The "Taxpayers' Suit."

At about the same time, in September 1962, the Schroeders, purporting to join with them certain other alleged taxpayers, filed a petition (under Ill. Rev. Stats., 1961, Ch. 113 §44) for leave to file a taxpayers' suit for injunction to prevent construction of the school building on the condemned land, which again sought to challenge the validity of the taking. The circuit court denied leave to file the taxpayers' suit on the ground it was a collateral attack on the judgment entered in the condemnation case.

The Third and Fourth Appeals.

The Schroeders thereupon appealed to the Illinois Supreme Court from the judgment denying leave to file the taxpayers' suit and from the order overruling their various motions in the condemnation suit filed, as above, in their answer to the petition for rule to show cause why they should not be held in contempt, in which they had sought to raise new points challenging the validity of the taking. The Illinois Supreme Court consolidated these appeals (over the objection of the Schroeders) and in May, 1963, affirmed the circuit court. *People ex rel. White* v. *Busenhart*, 29 Ill. 2d 156 (1963).

With reference to the Schroeders' petitions and motions in the condemnation case, the court held that all points therein raised were or could have been raised in the second appeal and therefore were conclusively adjudicated against the Schroeders by the decision on that appeal. (29 Ill. 2d at 159).

With reference to the taxpayers' injunction suit, the Illinois Supreme Court stated that the petitioners therein again sought to raise "the points urged in the eminent domain case." The court held that its judgment in the second appeal in that case was "not subject to collateral attack since the court had jurisdiction of the subject matter and the parties." (29 Ill.2d at 162). Petitioners filed a petition for rehearing which was denied.

The Federal Action.

The Schroeders next filed an action in the United States District Court, in which they again sought to relitigate the question of whether the school district had the right to take the land for school purposes. They asked for a declaratory judgment that the state court judgments and orders in the condemnation case were void; that plaintiffs be declared to be the rightful owners of the condemned property; and that the State of Illinois, the Trustees of Schools, and the School District be enjoined "from exercising any ownership over the premises herein and before described; or interfering with the rights of the plaintiffs as the rightful owners of the premises." (A. 20-21 in Case No. 1248, October Term 1965, in this Court.)

The district court dismissed the action, and the Courts of Appeals for the Seventh Circuit affirmed. Both courts held that the federal courts lack jurisdiction to review collaterally judgments of state courts having jurisdiction over the

person and subject matter, and that the questions sought to be raised had been conclusively adjudicated against petitioners in the condemnation proceeding. *Schroeder* v. *Illinois*, 354 F.2d 561 (7th Cir. 1965). This Court denied certiorari. 384 U.S. 972 (1966).

The Case at Bar.

The complaint in the case at bar was filed shortly before the federal action just described. The fifty defendants included past and present members of the School Board, the School Trustees, and the school administration, the deputy sheriffs who carried out the eviction orders, contractors and sub-contractors hired to build the school; and the utility company which shut off petitioners' electric power after the Court had ordered them evicted as well as others', including even a laborer employed to plow the land to prevent weed growth.

The complaint alleged that the fifty defendants conspired in December, 1961 (which is when petitioners were evicted pursuant to the court order carrying out the condemnation judgment) to take possession of the subject property and thereby destroy the fruit, vegetable, and Christmas tree business petitioners conducted there; and that defendants did so because petitioners were selling their produce at lower prices than their competitors. (A.16-17, 21 in case 947, October Term 1967, in This Court.) No defendant is alleged to be a competitor of petitioners or engaged in the produce business. The overt acts alleged to have been committed by various individual defendants were alleged to have been in furtherance of and pursuant to the supposed conspiracy, and for the sole purpose of achieving the object of the conspiracy.

The Illinois trial court entered summary judgment in favor of all defendants, without prejudice to petitioners' right to assert in separate suits against individual defendants any tort claims charged against any of them. The School defendants (respondents herein) also filed in the trial court, a motion to assess attorneys' fees and costs against plaintiffs under Section 41 of the Illinois Civil Practice Act (Ill. Rev. Stat., 1963, Ch. 110, §41), which provided for assessment of such expenses incurred by reason of allegations in a pleading "made without reasonable cause and not in good faith, and found to be untrue." The trial court denied this motion.

The Appellate Court of Illinois, in an appeal brought by the Schroeders, affirmed the summary dismissal of the complaint, holding that petitioners' claim that defendants took possession of their property not for a public purpose but for the purpose of destroying their fruit and vegetable business because they were underselling their competitors could have been raised in the condemnation case and was therefore barred by the judgment in that case. 80 Ill. App.2d 431 (1st Dist. 1967).

Upon defendants' cross appeal, the Appellate Court reversed the trial court's denial of §41 relief and remanded the case to the trial court for hearing to determine the amount of the expenses allowable. The court noted (80 Ill. App.2d 431, 441):

> "We think that the record in this case affords ample justification for a finding that the above allegations of plaintiffs' complaint were untrue, were made without reasonable cause, and were made in bad faith. . . ."

Petitioners then filed a petition for leave to appeal to the Supreme Court of Illinois, which that court denied without

opinion, and then a petition for certiorari to this Court, which was denied. (390 U.S. 947) (1968).

At the proceedings on remand, the respondents amended their original Section 41 motion to claim fees and expenses incurred following the appeal to the Illinois Appellate Court. The trial court, after a hearing, awarded respondents $16,168.46 for fees and expenses incurred in defending the matter in the trial court and at the appellate level in the state courts. Fees were not sought or awarded for successfully resisting certiorari to this Court (*i.e.*, 390 U.S. 947) (1968), or for the costs of any of the proceedings following the remand. The petitioners' appealed to the Illinois Supreme Court, which transferred the case to the Illinois Appellate Court, and the Appellate Court affirmed. (273 N.E.2d 750) (1st Dist. 1971). It is this 1971 Appellate Court decision which petitioners ask this Court to review.

ARGUMENT

I.

No Federal Constitutional Questions are Presented

In the decision which petitioners ask this Court to review, the Appellate Court pointed out that it is a settled matter of Illinois law that attorneys' fees awarded under Section 41 may include fees incurred at the appellate level where the appeal is a needless extension of a baseless lawsuit. *Manchester Ins. & Ind. Co. v. Straw*, 122 Ill.App.2d 183, 190 (2nd Dist. 1970).

Granted the allegations made in bad faith, the imposition of the sanctions of Section 41 does not raise a federal question. Sanctions similar to those of Section 41 are imposed by the federal courts. 6 Moore, *Federal Practice*, ¶54.77[2], at 1352 *et seq.* (2d ed. 1971). *Accord, Bell v. School Board*, 321 F.2d 494, 500 (4th Cir. 1963); *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473, 481 (4th Cir. 1951); *Taussig v. Wellington Fund, Inc.*, 187 F.Supp. 179, 222-23 (D. Del. 1960), *affirmed*, 313 F.2d 474 (3rd Cir. 1963), *cert. denied*, 374 U.S. 806 (1963).

Petitioners complain that the award was made to "an attempted intervenor, who is not a party to the action." The most cursory reading of the trial court judgment shows that this is not the case; the award was made to the individual school defendants who were defendants in the petitioners' original vexatious suit, although the award was made for the use and benefit of the school body which sustained the burden of the legal expenses involved.

Petitioners claim that award was for "multiple attorneys with overlapping and duplicative efforts." Again, the trial court record demonstrates that this is not true. The trial court found that there was no duplication of work on the part of the attorneys representing the respondents, and the Appellate Court specifically noted that there was no showing of any duplication of work. (272 N.E.2d 750, at 754.) Petitioners have never shown wherein there was any duplication of attorney's services. They merely, by conclusion, made the unsupported charge of duplication.

Petitioners argue that the amendment to the Section 41 motion was made in the trial court more than 30 days after the mandate of the Appellate Court had been filed. Petitioners do not suggest the source of the "rule" that a Section 41 motion must be amended within a particular time from the issuance of the mandate.

In any event, as pointed out by the Appellate Court, this objection was not timely raised in the trial court. (272 N.E.2d 750, at 753.) If there were a 30-day rule, that period would run from the date of reinstatement in the trial court, not from the date the mandate issues. (272 N.E.2d 750, at 753.) Further, the Illinois Appellate Court determined that no 30-day rule applies where the case continues, rather than where jurisdiction ceases following a final judgment. (*Ibid.*)

No federal constitutional question is presented by these Illinois procedural rules. *Bailey* v. *Anderson*, 326 U.S. 203, 205 (1945).

II.

There Was No Denial Of Federal Constitutional Rights In Denying A Continuance To The Petitioners

On September 17, 1968, after a number of continuances had been granted to the petitioners, the trial court set the Section 41 hearing for October 15, 1968, the order providing that no further continuances would be granted. Petitioners' counsel who ultimately participated in the Section 41 hearing (Petitioners' third attorney in four months) had been retained "to look into the case" on September 20, 1968, and was retained "to handle the case" on October 13, 1968. On October 15, petitioners moved for another continuance, and the motion was denied.

The denial of the motion for a further continuance was predicated on Illinois Supreme Court Rule 231(f) (Ill. Rev. Stat., 1969, Ch. 110A, §231(f)) which provides that "no motion for a continuance of a cause made after the cause has been reached for trial shall be heard, unless a sufficient excuse is shown for the delay," and upon the Rules of the Circuit Court of Cook County which state that a continuance shall not be granted upon the grounds of substitution of attorneys (Rule 6.1(b)).

It is, of course, only an arbitrary denial which denies due process. As this Court noted in *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964):

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. . . . Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the

> right to defend with counsel an empty formality. . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."

The circumstances present in the instant case—a fourth request for a continuance by the petitioners' third attorney in four months made on the day an uncomplicated hearing was to begin after the trial court had advised all parties a month earlier that no further continuances would be granted—establish that the denial was not arbitrary.

III.

Petitioners Were Not Denied Federal Constitutional Rights by the "Illinois Court Summary Judgment Procedures".

Finally, in a one-paragraph point, petitioners urge that they were denied constitutional rights by "the summary judgment procedure." It is impossible to determine to what the petitioners have reference. The only summary judgment granted in the litigation was the summary judgment entered by the trial court in 1964, which dismissed the petitioners' complaint and denied respondents' motion for fees and expenses under Section 41. That determination was appealed to the Illinois Appellate Court, which affirmed as to the dismissal of the complaint and reversed as to the denial of the Section 41 motion in the opinion reported at 80 Ill.App.2d 431 (1st Dist. 1967). This Court declined to review by certiorari that decision. 390 U.S. 947 (1968). No summary judgment motion was filed and none granted after the remand in 1968 by the Appellate Court. A full hearing was held at that time by the trial

court to determine the amount of fees and expenses to which respondents were entitled under Section 41.

In any event, the point now urged by petitioners (whatever that point may be) was not raised in the Court below, and it has therefore been waived. See *Michel* v. *Louisiana*, 350 U.S. 91, 99 (1955); *Bailey* v. *Anderson*, 326 U.S. 203, 206-07 (1945).

CONCLUSION

This petition for certiorari, which is but the latest episode in petitioners' campaign of unceasing relitigation against the School District, is frivolous and should be denied.

Respectfully submitted.

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